

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

JERRY CADIGAN, and NANCY CATON
CADIGAN, as the Proposed Administrators of
the Estate of TREVOR NORRIS CADIGAN,
deceased,

Plaintiffs,

-against-

LIBERTY HELICOPTERS, INC., a New York
Corporation; NYONAIR, LLC, a New Jersey
Limited Liability Company; MERIDIAN
CONSULTING I CORPORATION, INC., a
Delaware Corporation; RICHARD ZEMKE
VANCE, a Connecticut resident; AIRBUS
HELICOPTERS, S.A.S., a French Corporation;
AIRBUS HELICOPTERS, INC.; a Delaware
Corporation; and APICAL INDUSTRIES, INC.
d/b/a DART AEROSPACE, a California
Corporation;

Defendants.

INDEX NO.: 152286/2018

**ATTORNEY AFFIRMATION IN
OPPOSITION TO MOTION TO
DISMISS AND IN SUPPORT OF
CROSS-MOTION TO COMPEL**

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

GENE K. KASKIW, an attorney duly admitted to practice law before the Courts of the State of New York, hereby states the following to be true under penalties of perjury:

1. I am an attorney with the firm of LEWIS BRISBOIS BISGAARD & SMITH, LLP, attorneys for the Defendants LIBERTY HELICOPTERS, INC.; MERIDIAN CONSULTING I CORPORATION, INC.; and RICHARD ZEMKE VANCE (collectively, "Liberty" unless necessary to distinguish) in the above-captioned action. As such, I am fully familiar with the facts and circumstances surrounding the action herein.

2. Liberty respectfully submits this Affidavit to join in the Opposition filed on September 6, 2018 by plaintiffs JERRY CADIGAN and NANCY CATON CADIGAN, as Proposed Administrators of the Estate of TREVOR NORRIS CADIGAN, deceased.

3. This Affidavit is also submitted in support of an Order, pursuant to CPLR §3126, compelling Apical to respond to Liberty's CPLR 3120 discovery demands, served on or about July 10, 2018, within 30 days of the entry of the Order.

FACTS

4. This is, inter alia, a wrongful death, negligence and products liability action commenced by Plaintiffs JERRY CADIGAN, and NANCY CATON CADIGAN, as the Proposed Administrators of the Estate of TREVOR NORRIS CADIGAN, deceased, as against Liberty Helicopters and other such Defendants.

5. The matter arises from a helicopter accident (the "subject accident") on March 11, 2018 in the East River, New York, New York. The helicopter, an Airbus Eurocopter AS350B2 model registered N350LH (the "accident helicopter"), sustained a loss of power event which necessitated a water landing in the East River.

6. Of the six persons on board, five perished, including plaintiffs' decedent, Trevor Norris Cadigan.

7. Prior to impact with the water, pilot Richard Vance activated the helicopter's emergency float system, designed to keep the helicopter afloat in the event of a forced landing on water, otherwise known as a ditching.

8. After impact with the water, it became apparent that the right-hand side floats did not properly deploy, causing the accident helicopter to immediately list to the right, fill with water and capsize, inverted in the East River, with all six occupants still in the cabin.

9. The emergency float system installed on the accident helicopter was manufactured by Dart Aerospace, a subsidiary of co-defendant/movant Apical Industries, Inc. (“Apical”) See Amended Complaint at ¶¶344-399.

10. Apical has moved to dismiss the complaint under CPLR 3211(a)(8) for lack of in personam jurisdiction.

ARGUMENT

A. Legal Standard for CPLR 3211(a)(8) Motion to Dismiss:

11. As a preliminary matter, Apical incorrectly sets forth the burden of proof necessary to defeat a motion to dismiss on CPLR 3211(a)(8); stating that an opponent must “demonstrate that this Court can exercise personal jurisdiction over Apical...” See Moving Memorandum at 2.

12. Apical makes its motion while simultaneously refusing to provide any disclosure on the matter of jurisdiction.

13. Instead of responding to specific, targeted jurisdictional discovery demands provided by plaintiffs and Liberty, Apical has provided summary-form data as to its New York sales and a self-serving affidavit of its CEO. See Moving Affidavit of Alain Madore (“Madore Aff.”), attached to Apical’s motion.

14. In essence, Apical is asking the Court and the parties to take it at its word, as if the subject matter of this litigation was completely unforeseeable, despite occurring in the midst of the busiest airspace in North America.

15. Without the benefit of any disclosure beyond publicly-available sources and, ironically, materials supporting Apical’s motion, plaintiffs have nevertheless demonstrated that Apical has taken deliberate steps to attract and support customers in and around the State of New York, through marketing, sales and commercial relationships with service providers.

16. Indeed, Apical admits is has engaged in at least \$194,000 of sales with customers in the State of New York since 2010, though it provides no proof or documentation for its figures other than summary-form data . See Madore Aff.

17. Liberty respectfully submits that this is still enough to defeat Apical's motion. Under New York law, a successful opposition to a motion to dismiss under CPLR 3211 (a) (8), **does not** require a prima facie showing of jurisdiction, but needs only make a "sufficient start" establishing that personal jurisdiction **may exist** and that the basis for personal jurisdiction is not frivolous. Shore Pharm. Providers, Inc. v. Oakwood Care Ctr., Inc., 65 AD3d 623, 624 (2d Dept. 2009)(emphasis added).

18. Similarly the New York State Court of Appeals has found that an opposing party need only demonstrate that critical jurisdictional facts **may exist**, not that they **do exist**. "This **obviously** must await discovery." See Peterson v. Spartan Indus., Inc., 33 N.Y.2d 463, 466 (1974)(emphasis added).

19. As will be shown infra, the "sufficient start" is self-evident, and, at minimum, the burden of proof under New York law calls for the exchange of full jurisdictional discovery, depositions and analysis to properly adjudicate this threshold issue.

20. It would be a clearly unjust outcome, contrary to black-letter law, if the Court were to decide the issue of in personam jurisdiction as to Apical on such limited data, especially in view of the clear questions of material fact raised by the parties.

B. In Personam Jurisdiction: A Two-Step Inquiry:

21. As set forth in papers already before this Court, the proper exercise of in personam jurisdiction by Courts in the State of New York is determined by a two-step process, consistent with federal jurisprudence. See e.g., LaMarca v. Pak-Mor Mfg. Co., 95 N.Y.2d 210 (2002); International

Shoe Co. v Washington, 326 U.S. 310 (1945); Asahi Metal Industry Co. v Superior Court.. of Cal., 480 US 102 (1987).

22. The first prong calls for analysis of whether the New York long-arm statute, codified at CPLR §302, confers jurisdiction over the non-domiciliary corporation. In pertinent part, as regard the facts and circumstances of this matter, the statute sets forth the following:

§ 302. Personal jurisdiction by acts of non-domiciliaries

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he

(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or

(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce . . .

CPLR §302(a)(3).

23. The second prong of the analysis directs the Court to evaluate whether the exercise of jurisdiction meets the standard of due process, which is interpreted to require certain minimum contacts with the forum state, such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice.” International Shoe, supra, at 316, (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

24. In cases involving attempts to assert in personam jurisdiction over non-domiciliary manufacturers, jurisdiction is properly laid if the sale of the offending product of a “manufacturer . . . is not simply an isolated occurrence, but arises from the efforts of the

manufacturer . . . to serve, **directly or indirectly**, the market for its product in other States.”
World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)(emphasis added).

25. Liberty contends that factual assertions already submitted in this nascent litigation suggest that a proper exercise of in personam jurisdiction over Apical may indeed exist; therefore, the Court should deny the motion consistent with prevailing case law, or, at minimum, hold it in abeyance until jurisdictional discovery can be carried out.

C. Long-Arm Jurisdiction:

26. The New York Long Arm statute is codified at CPLR 302 and provides a means for jurisdiction to be asserted over a non-resident defendant.

27. The conferral of jurisdiction under this provision rests on five elements: First, that defendant committed a tortious act outside the State; second, that the cause of action arises from that act; third, that the act caused injury to a person or property within the State; fourth, that defendant expected or should reasonably have expected the act to have consequences in the State; and fifth, that defendant derived substantial revenue from interstate or international commerce. LaMarca v. Pak-Mor Mfg. Co., 95 N.Y.2d 210, 214 (2nd Dep’t. 2000).

28. Liberty agrees with plaintiffs insofar as they claim public data and materials provided by Apical support a finding by a Court in the State of New York that Apical is reasonably subject to in personam jurisdiction.

29. With respect to the first factor of the CPLR §302(a)(3) analysis, evidence adduced to date suggests that some tortious act (i.e., plaintiffs’ allegation of potentially negligent manufacture¹ or installation of the float system installed on the accident helicopter) leading to the subject matter of

¹ To date, Liberty has not asserted cross-claims as of right against any defendants.

this litigation took place outside of the State of New York, necessitating an application of the Long Arm statute to obtain jurisdiction over Apical.

30. It is also beyond dispute that the cause of action herein arises from the failure of the emergency float system and that same caused injury to persons or property within the state.

31. The fourth element directs the finder of fact to evaluate the reasonableness of Apical's expectation that it might be subject to suit in the State of New York.

32. Plaintiffs have identified Apical's affiliation with a service center in Rome, New York, suggestive of Apical's awareness that its customers and/or products are in the State of New York, and evinces a desire to provide technical support to those customers. See Plaintiff's Affirmation of Counsel, Exhibits E-G.

33. Relevant to the fifth factor, Apical, a California entity, has conceded that it engages in interstate commerce, by stating that it has derived over \$194,000 in sales directly to the New York market. See Madore Aff.

34. It is therefore a reasonable exercise of this Court's discretion to find that facts may exist supporting an exercise of jurisdiction over Apical in the State of New York on the basis of the Long Arm statute, and at minimum, deny this motion.

D. Due Process and Minimum Contacts:

35. The due process component of the jurisdictional analysis is based on evaluation of so-called "minimum contacts" sufficient to avoid offending "traditional notions of fair play and substantial justice." Id. at 213.

36. This is based on the standard set forth in the seminal case, International Shoe Co. v. State of Wash., 326 U.S. 310 (1945) and its progeny, wherein the United States Supreme Court began to crystallize the "purposeful availment" standard. See also Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985); Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984) ("So long as a

commercial actor's efforts are "purposefully directed" toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there...")

37. "Moreover, the forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce **with the expectation that they will be purchased by consumers in the forum State.**" World-Wide Volkswagen, 444 U.S. at 298.

38. The due process analysis is therefore flexible and also weighs the interest of the forum state in adjudicating matters involving its residents who are injured in the forum state. See LaMarca, 95 N.Y.2d at 218.

39. In this matter, despite a limited record, it is clear that an exercise of jurisdiction in the State of New York over Apical, a foreign corporation, does not impose an unreasonable burden in view of information developed by plaintiffs.

40. By way of example and not limitation, as set forth on page 13 of plaintiffs' memorandum of law in opposition to Apical's motion, Apical has: (1) an authorized service center in Rome, New York; (2) affiliated with a product development center in the State of New York; (3) has booked over \$194,000 in sales in the State of New York since 2010; and (4) is engaged in interstate commerce.

41. These factors, in their own right, could reasonably support an exercise of the Court's sound discretion in asserting jurisdiction over Apical.

42. Liberty respectfully submits that further discovery may indeed reveal an ironclad basis for jurisdiction, and believes plaintiffs have more than carried their burden in demonstrating a "sufficient start" under Peterson, supra.

E. Jurisdictional Discovery is Appropriate and Should Be Permitted:

43. Liberty joins plaintiffs in calling for leave to conduct jurisdictional discovery if the Court is not inclined to find, as a matter of law, that current constellation of facts adduced herein support an exercise of in personam jurisdiction over Apical.

44. As referenced supra, at the pleadings stage, plaintiff does not carry the burden of **proving** that a court may properly exercise in personam jurisdiction over a non-domiciliary.

45. Imposing such a high bar without the benefit of any disclosure is unreasonable where, as here, dispositive facts as to the issue are in the sole possession of the party over which jurisdiction is sought.

46. Accordingly, New York Courts at every level have consistently held that jurisdictional discovery is to be provided where the foreign defendant's forum contacts cannot be thoroughly analyzed based on publicly-available information. See, e.g. Peterson, 33 N.Y.2d at 467; Am. BankNote Corp. v. Daniele, 845 N.Y.S.2d 266, 268 (1st Dept. 2007); Fed. Ins. Co. v. Specialty Paper Box Co., 222 A.D.2d 254, 255 (1st Dept. 1995).

47. New York's approach in this respect is rooted in federal law. Under Rule 12 of Federal Rules of Civil Procedure, a federal district court may hold in abeyance a motion to dismiss for lack of personal jurisdiction to enable the parties to employ discovery on the jurisdictional issue. Fed. R. Civ. P. 12(b).

48. By demonstrating that facts "may exist" sufficient to support a finding of in personam jurisdiction, New York Courts are expressly permitted to provide the parties an opportunity to conduct jurisdictional discovery. Peterson, 354 N.Y.S.2d at 908.

49. The CPLR codifies this procedure at Rule 3211(d):

(d) Facts unavailable to opposing party.

Should it appear from affidavits submitted in opposition to a motion made under subdivision (a) or (b) that facts essential

to justify opposition may exist but cannot then be stated, **the court may deny the motion**, allowing the moving party to assert the objection in his responsive pleading, if any, **or may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just**.

CPLR 3211(d)(emphasis added).

50. While not an entitlement as a matter of law, jurisdictional discovery is a valuable tool for enabling a complete jurisdictional analysis in this case over Apical, a privately-held corporation with limited publicly-available data relevant to forum contacts.

51. As in Peterson, supra, plaintiffs are seeking to assert jurisdiction over Apical under the long-arm statute, where the substance underlying issues of jurisdiction are unquestionably complex and, for commercial reasons, not always readily available in the public domain.

52. The Appellate Division, Second Department has acknowledged that jurisdictional discovery may be “**essential**” in cases of this nature. See Expert Sewer & Train, LLC v. New England Mun. Equip. Co., Inc., 964 N.Y.S.2d 597, 598 (2nd Dep’t. 2013).

53. For example, one matter which clearly bears on jurisdiction, and for which discovery is critical, is whether an agency relationship exists between Apical and EuroTec Canada Limited.

54. In connection with this litigation, a review of documents maintained by Liberty revealed a letter from Dart Aerospace, Apical’s subsidiary and the manufacturer of the emergency float system, addressed to a representative of EuroTec Canada Limited, which references an installation of a component part of the float system in a non-standard location on the accident helicopter. See a true copy of the October 30, 2013 letter from Brandon Peters of Dart Aerospace to Bentley Thistlethwaite of EuroTec Canada, annexed hereto as Exhibit A.

55. It is beyond dispute that a failure of the float system installed on the accident helicopter comprised a significant consideration associated with the subject accident, and the

possible negligence which may be found may have a material effect on a determination of liability in this matter.

56. In this case, plaintiffs assert, inter alia, theories of negligent design and manufacture against Dart. See, e.g., Amended Complaint at ¶¶344-399.

57. One legal question to be resolved is, therefore, the impact of the potential agency relationship between Dart and EuroTec Canada Limited on jurisdiction.

58. New York's long-arm statute provides that jurisdiction can be exercised over a corporation whose agent commits a tortious act outside of the state, causing injury to personal property within the state. See CPLR §302(a)(3) et seq.

59. Liberty is therefore attempting to analyze the potential of an agency relationship between Apical and EuroTec Canada Limited, specifically to determine whether such a relationship exists as contemplated by CPLR §302(a)(3).

60. This is one, among many, material facts bearing directly on jurisdiction that cannot be resolved at present.

61. Liberty respectfully submits that information related to the relationship between Apical (d/b/a Dart) and EuroTec Canada Limited are within the care, custody and/or control of Apical.

62. Liberty has sought this information through multiple channels, including by way of demands served directly on Apical, which Apical has refused to answer. See a true copy of Liberty's demands, annexed hereto as Exhibit B.

63. It is likely, and in excess of the applicable standard for the provision of jurisdictional discovery under New York law, that such information, if properly disclosed, would be dispositive of the issue as to an agency relationship between Apical and EuroTec Canada Limited.

64. This issue alone demonstrates why it would be a manifestly unjust result for this Court to conclude that Apical is not subject to in personam jurisdiction based solely on the sparse record before it.

65. As plaintiffs point out, additional information related to Apical's business operations is obscured by its status as a privately-held corporations. This includes, inter alia: (1) accounting practices and methodologies through which Apical has derived its representations in the Affidavit of Alain Madore; (2) information as to the identities and/or locations of customers; (3) context for sales figures to permit comparison of New York sales to other regions and geographies; (4) specific information pertaining to Apical's business relationship with distributors and service providers in the State of New York; (5) materials pertaining to Apical's marketing and advertising practices; and (6) the foreseeability of an Apical product being used in the New York City area, one of the busiest regions in the world for helicopter operations.

66. All of these open items can be satisfied through jurisdictional discovery, during which time specific jurisdictional matters can be investigated.

67. Accordingly, Liberty joins with plaintiffs in requesting that this Court provide an opportunity for the parties to conduct jurisdictional discovery if it is unconvinced that in personam jurisdiction is already available.

F. Motion to Compel Disclosure:

68. Liberty respectfully submits that Apical should be compelled to respond to the narrowly-tailored jurisdictional discovery demands served on or about July 24, 2018. See Exhibit B hereto.

69. Pursuant to CPLR 3120, Liberty sought discovery of Apical's New York forum contacts so as to make a determination of whether it would be appropriate to challenge Apical's assertion that in personam jurisdiction by the Courts of the State of New York is improper.

70. This office corresponded with Apical's counsel requesting responses to these discovery demands on July 24, 2018, annexed hereto as Exhibit C hereto.

71. In response thereto, on July 26, 2018, Apical's counsel replied that, pursuant to CPLR 3214, all discovery is stayed pending the resolution of Apical's CPLR 3211 motion to dismiss. See Exhibit D hereto.

72. As set forth herein, responses to these demands are essential to formulate the basis for a jurisdictional analysis pertaining to Apical's forum contacts.

73. Based upon the foregoing and, pursuant to CPLR §3126, Liberty requests that Apical be compelled to provide responses to the discovery demands on a date certain. See Dell'Aquila v. Supermarkets General Corp., 180 A.D.2d 708, 579 N.Y.S.2d 738 (2nd Dept. 1992).

WHEREFORE, Defendants LIBERTY HELICOPTERS, INC.; MERIDIAN CONSULTING I CORPORATION, INC.; and RICHARD ZEMKE VANCE, respectfully request that this Court issue an Order:

- a) Denying Apical's Motion to Dismiss in its entirety; and
- b) permitting discovery of Apical's forum contacts, to include paper discovery and deposition of witnesses; or, in the alternative
- c) holding Apical's motion in abeyance and compelling a response to Liberty's CPLR 3120 discovery demands, served on or about July 10, 2018, within 30 days of the entry of the Order; and
- d) for such other and further relief as this Court deems just, equitable and proper.

/s/ Gene K. Kaskiw

Gene K. Kaskiw, Esq.

Sworn to before me this
10th day of September, 2018

Notary Public

AFFIRMATION OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

GENE KASKIW, an attorney-at-law licensed to practice in the State of New York, employed by the law firm of LEWIS BRISBOIS BISGAARD & SMITH LLP deposes and says: deponent is not a party to this action, is over 18 years of age with business address in New York County. That on the 10TH day of September, 2018, deponent served the within document(s) upon:

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at the address(es) designated by said attorney(s) for that purpose by filing same with the New York Supreme Court Electronic Filing System (NYSCEF).

DATED: September 10, 2018

/s/ Gene K. Kaskiw